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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1965

No. 719

CONVOY COMPANY,
Appellant,

vs.

THE UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION,
Appellees.

On Appeal from the United States District Court for the District of Oregon

JURISDICTIONAL STATEMENT

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In the Supreme Court
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OCTOBER TERM, 1965

No.

CONVOY COMPANY,
Appellant,

vs.

THE UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION,
Appellees.

On Appeal from the United States District Court for the District of Oregon

JURISDICTIONAL STATEMENT

Appellant appeals from the final order and judgment of the United States District Court for the District of Oregon, entered on July 20, 1965, dismissing the complaint of appellant as plaintiff in the Court below which sought to set aside, annul and declare void certain orders of the Interstate Commerce Commission. Appellant respectfully submits this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

OPINION BELOW AND ORDERS OF COMMISSION

The order and judgment of the District Court of Oregon (unreported) is set forth in Appendix "A" attached hereto. There was no opinion of the Interstate Commerce Commission precedent to its orders which are set forth in Appendix "B" attached hereto.

JURISDICTION

Appellant, as plaintiff, brought this action under Title 28 of the United States Code, Sections 1336, 1398, 2284 and 2321 through 2325; Title 49, United States Code, Sections 17 (9), 305 (g), 305 (h), 306 (a) and 307 (a); and Section 10 of the Administrative Procedure Act, Title 5, United States Code, Section 1009, to enjoin, annul and set aside orders of the Interstate Commerce Commission providing for the issuance of a certificate of public convenience and necessity by that Commission. The issuance of said certificate was stayed by the Honorable Justice Douglas on the petition of appellant. The judgment and order of the District Court was entered on July 20, 1965. Notice of appeal was filed in the District Court on September 10, 1965. The jurisdiction of the Supreme Court to review this decision by direct appeal was conferred by 28 U.S.C. § 1253 and § 2101 (b). This Court has jurisdiction: *Interstate Commerce Commission v. Parker,* 326 U.S. 60 (1945). *American Trucking Assns., Inc. v. United States,* 364 U.S. 1 (1960).

QUESTIONS PRESENTED

(1) Whether the District Court erred in holding that there was substantial evidence to support a determination of public convenience and necessity by the Interstate Commerce Commission as required by Section 207 (a) of the Interstate Commerce Act (49 U.S.C. 307 (a)) for the extension of the motor common carrier operating rights of Commercial Carriers, Inc. (hereafter referred to as Commercial Carriers):

(a) Where the Commission refused to hold a hearing although one was requested for the purpose of offering evidence bearing on the ultimate question of public convenience and necessity;

(b) Where no shipper showed any present or future need for the extended authority, and there was sufficient and satisfactory certificated motor carrier service in the area covered by the extension;

(c) Where the extension is based on a policy decision of the Commission which was tentative only, and which the Commission itself has in effect stayed by opening a new proceeding not yet concluded for the purpose of redetermining the issues of said policy decision, which had already been eroded by a subsequent decision of the Commission making contrary findings on certain issues;

(d) Where exhibits containing substantial evidence showing that there was no basis for enlarging the certificate, even under the policy decision, were offered to the District Court and marked for identification but were not received or considered.

(2) Whether the Fifth Amendment and Sections 5 (a) and (b), 7 (c) and 8 (b) of the Administrative Procedure Act (5 U.S.C. 1004 (a) and (b), 1006 (c) and 1007 (b)) have been violated by orders of the Interstate Commerce Commission which contain no reference to material issues of fact and law, are based upon no hearing, though one was repeatedly requested by appellant, and set forth no findings or conclusions supporting them, thus resulting in failure to accord due process of law.

STATEMENT OF THE CASE

Appellant, Convoy Company, is an Oregon corporation, being a motor common carrier holding a certificate of public convenience and necessity issued by the Interstate Commerce Commission authorizing the transportation of automobiles, among other vehicles, in truckaway service, in secondary movements, between points in Oregon in interstate or foreign commerce, as pertinent to this case. Appellant has held this certificate for some twenty years and has continuously provided service to the public under it.

Commercial Carriers, a motor carrier of automobiles and trucks, on September 30, 1959, obtained an order from the Commission approving the purchase by it of Western Auto Transport, Inc., which then held a certificate from the Commission, among others, authorizing the transportation of new automobiles by the truckaway method in initial movements from Detroit, Michigan, to all points in Washington and

Oregon over irregular routes. On December 3, 1963, Commercial Carriers filed a petition with the Commission for "modification" of its certificate which was, in effect, a request for an expansion of its authority and the issuance of a new certificate so as to permit it to transport new automobiles, by the truckaway method, in secondary movements, from Portland, Oregon, to points in Oregon and Washington over irregular routes, restricted to automobiles that have been manufactured or assembled at plants of the Chrysler Corporation in Detroit, Michigan, and further restricted to said automobiles that have had an immediately prior movement by rail.

This petition was filed by Commercial Carriers, responsive to the suggested procedure of the Commission in its decision in *National Automobile Transporters Association—Declaratory Order,* 91 M. C. C. 395 *(NATA),* decided October 15, 1962. In that case the Commission reviewed the history of automobile transporting, emphasizing the diversion in 1960 and thereafter from truck to rail of hauls of automobiles previously handled by initial carriers from the assembly points. Initial carriers are those who originate shipments from the plants in a first motor carrier movement, all other movements being secondary. The Commission in its decision in the *NATA* case dealt specifically with the adverse effects on the motor carriers of such diversion and proposed a method for the initial carriers to obtain relief through modification of their certificates so as to authorize secondary movements from rail ramps to consignees of shipments

which come by rail from the assembly plant, previously served by the motor carrier in initial movements, to the ramp points on the rail system in destination areas. The Commission briefly indicated what it would expect in such a petition, primarily a showing of the volume of traffic handled by the motor carrier before and after diversion by rail.

Despite the vigorous protest of appellant and its request for oral hearing and offer to submit testimony, the Commission nevertheless on December 17, 1964, service date, December 23, 1964, issued its order, by its Division 1, granting the petition, authorizing the proposed service from Portland, Oregon, to points in Oregon only, restricted as previously set forth. This order was issued without an oral hearing, supported only by the bare petition. The lack of due process evidenced thereby is the fundamental basis for this appeal.

Appellant, Convoy Company, as a motor carrier, pursuant to the operating authority above set forth, participated in the distribution of Chrysler traffic for many years, including those of 1955 through 1957, and 1961 to the present time. Exhibits showing, among other things, the volume and revenues of appellant's participation and its investments to take care of the traffic were offered to the District Court, the Commission having refused to hold a hearing, but such evidence was not received or considered.[1]

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[1]A review of the exhibits offered and not received or considered by the Court shows the pertinency and materiality of the evidence to be adduced. Thus, Exhibit 1 shows the sub-

Appellant brought this action to set aside the action of the Interstate Commerce Commission after having exhausted its administrative remedies.

The hearing was before the District Court as a specially-constituted three-judge Court pursuant to 28 U.S.C § 2325 and § 2284, comprised of the Honorable Ben C. Duniway, Circuit Judge, John C. Bowen and Gus J. Solomon, District Judges.

The District Court's opinion, Appendix "A" hereof, summarily affirmed the orders of the Commission and dismissed the action of appellant on the grounds that the evidence offered was not offered to the Commission and, in any event, was not germane to any issue

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stantial investment of appellant at Portland, Oregon, in excess of $1,800,000 (terminal and equipment). Exhibit 2 shows that the annual revenues of Commercial Carriers (to whom the certificate was ordered to be released by the Commission) averaged $15,000,000 for the period 1961 through 1964. These compare to the insubstantial traffic disclosed in the petition of Commercial Carriers, Appendix "A" (no revenue figures were given), of only 1,190 vehicles delivered into Oregon by it from May, 1958, through December, 1959. Thus, the inconsequential revenues of the Oregon haul as compared to the gross did not warrant relief to Commercial Carriers, Inc., under the NATA decision and factually distinguishes the Motor Convoy case hereafter referred to. The said appendix also reveals that there were many months when no vehicles were delivered at all, including summer months when obviously other carriers were doing the business. On the other hand, Exhibit 8 offered by appellant shows that, even during the years as far back as 1955, appellant enjoyed revenues of as much as $392,000 a year of Chrysler traffic, 40% of which was destined to Oregon points. Exhibit 9 shows the revenue from Chrysler traffic delivered to Oregon by appellant from 1961 through 1964, being over $150,000 in 1964.

While not providing specific detail, appellant asked the Commission for a hearing to present such evidence, as well as to show the eroding effects on appellant of successive grants of such new rights to competitors.

in the case, and that the orders of the Commission complained of were supported by substantial evidence, were not arbitrary or capricious, and that the decision in *Motor Convoy, Inc. v. U.S.*, D.C. Ga., 235 F. Supp. 250 (1964), affirmed *per curiam*, 85 S. Ct. 1575 (1965), was persuasive.

The District Court in deciding adversely to appellant failed: (1) to determine the right of the Commission by the NATA decision to adopt a general policy granting certificates of public convenience and necessity without substantial evidence and without a hearing; (2) to consider the fact that the NATA decision was not and is not final, and in fact was rendered ineffective by the decision of the Commission in *Ex Parte No. 230*, 322 I. C. C. 301 (1964), wherein findings were made which the Commission itself held were inconsistent with and contrary to those made in NATA, as had been predicted by the dissenting Commissioners in NATA; (3) to consider the fact that after the decisions in NATA and *Ex Parte No. 230*, the Commission established a new proceeding for the purpose of considering the field of substituted service for automobile transporters, including all of the questions pertinent to NATA. That case is entitled *"Substituted Service—Charges and Practices of For-Hire Motor Carriers of Automobiles (Piggyback Service)"* and docketed as *Ex Parte No. 230*, Sub. No. 1; (4) to consider the fact that in view of the establishment of the proceeding in *Ex Parte No. 230*, Sub. No. 1, it is inappropriate for the Commission to issue certificates, particularly without hearings, on the basis of NATA,

which, as aforesaid, was superseded both by *Ex Parte No. 230* and *Ex Parte No. 230,* Sub. No. 1; (5) to consider the rights of appellant, Convoy Company, as they would be adversely affected by inflicting upon it new competition without any showing of public convenience or necessity therefor in contravention of Section 207 (a) of the Interstate Commerce Act (49 U.S.C § 307 (a)); (6) to consider the manner in which the shippers obtained delivery from Portland, Oregon, to points in Oregon since 1960-1961 when diversion to the rail lines occurred; (7) to consider the evidence offered by appellant, Convoy Company, including evidence of the volume and revenues derived by it for the years 1955 through 1957, and 1961 through 1964 of such Chrysler traffic, indicating complete adequacy of existing service to meet the shipper's needs, and evidence that the volume of traffic was an unimportant proportion of Commercial Carriers' business and therefore inadequate to qualify under the NATA decision; or (8) to consider whether the Commission's order and procedure accorded due process of law under the Fifth Amendment and under the Administrative Procedure Act (5 U.S.C 1007) particularly in view of the fact that no hearing was held despite the statutory requirements therefor and the written request of appellant coupled with its protest timely filed against the granting of the petition.

On this appeal appellant contends that as a matter of law Commercial Carriers' prior authority to transport automobiles from Detroit, Michigan, for Chrysler Corporation forms no lawful basis in and of itself on

which the Commission could grant new authority to Commercial to transport automobiles from Portland, Oregon, to points in Oregon, following independent movements by railroads; that proof of public convenience and necessity under Section 207 (a) of the Interstate Commerce Act (49 U.S.C 307 (a)) and the requirements of the Administrative Procedure Act necessitate a hearing and a record upon which a finding of need for additional service can be made only if supported by substantial evidence; that the action of the Commission in granting a certificate under the circumstances presented without a hearing is arbitrary, unlawful, and a denial of the rules of fair play which are basic to our legal system.

Appellant further contends that the Court was in error in failing to consider and find material the evidence offered, and in holding that the evidence had not been properly offered to the Commission when in fact in appellant's request for a hearing, it was made known to the Commission that appellant would have evidence to present showing the volume of traffic which it had handled and the adverse effects of the diversion threatened by the grant of authority to Commercial Carriers. Furthermore, the Commission failed to adopt its invariable practice, when it determined that no hearing be held, of using the so-called modified procedure which permits the submission of evidence in affidavit form, and no notice was presented to appellant that the Commission would in the case before it fail and refuse to abide by the procedures specified in its own rules and invariably invoked

by it, that is, either a hearing or modified procedure.[2] Therefore, appellant was under no notice that any evidence which it had to offer had to be outlined in detail, believing that either a hearing would be held for the purpose of presenting specific evidence in the areas in which it did clearly indicate it had evidence to offer, or that it would be permitted through verified statements to submit evidence in a no-hearing procedure. As a matter of fact, in certificate cases, except under the NATA policy, it is the Commission's practice to hold a hearing whenever there is a protest even though the applicant requests that the Commission invoke modified procedure unless there are so many parties (not the case here) that prehearing conferences are held at which specific procedures are adopted including provision for verified statements and hearings to cross-examine affiants.

QUESTIONS ARE SUBSTANTIAL

This appeal presents questions of very substantial importance in the administration of Section 207 (a) of the Interstate Commerce Act (49 U.S.C § 307 (a)) upon which the Supreme Court has not had the occasion to make any definitive determination and which are so substantial as to require plenary consideration by this Court. The paramount question of greatest importance relates to whether the Interstate

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[2]General Rules of Practice of Interstate Commerce Commission, 1.45 through 1.54, 27 F.R. 7519, effective July 16, 1962.

Commerce Commission may lawfully devise and apply as the *sole criteria* of public convenience and necessity the loss of business by a motor carrier resulting from a change in the method of distribution by a shipper; and whether, in one full sweep, the Commission may abandon the connotations of the nouns in the phrase "public convenience and necessity" and grant substantial and important operating rights without hearings, or any other procedure which makes it possible to develop a record, all on the basis of a policy adopted in one case which is rendered ineffective by another and reopened in a third not yet concluded.

Appellant recognizes that the Supreme Court has affirmed the decisions of the Commission and the District Court in *Motor Convoy, Inc. v. U.S.*, supra. Since that decision, however, it has become apparent that the questions involved are more substantial than apparently was believed to be the case by the Court. Almost every grant of authority that has been issued by the Commission in the NATA policy decision has been appealed to a federal court. The tendency of such courts is, of course, to be governed by the affirmation of the Supreme Court in the *Motor Convoy* decision, but the District Court in that decision did not mean its opinion to be a precedent. It said:

> "We are not ruling that the Commission was compelled to grant Dixie's application, but only that it was authorized in so doing, nor do we wish to set an unfortunate precedent for future applications wherein it might clearly appear that there is relevant testimony that should be considered by the Commission." (P. 253)

The Court further stated that it failed to find in the record any statement as to the nature of the testimony the protesting carriers desired to introduce before the Commission, nor did it find any résumé of the same in the brief filed in the case. (P. 261) Furthermore, the petition in Motor Convoy showed that approximately 70% of petitioner's gross revenue was involved in the diversion, whereas the Commercial Carriers' petition shows that the revenues were relatively insignificant compared to its gross revenues and those of its predecessor. In fact, the Commission denied a similar petition, also without a hearing, involving a plant of Chrysler in California wherein the petitioner also sought to serve points in Oregon from railheads in Oregon and wherein a larger volume of traffic had been shown to have been transported by that petitioner from California to Oregon than by the petitioner Commercial Carriers from Detroit to Oregon. All this appellant offered to prove to the District Court by Exhibit No. 12, the order of the Commission in the Robertson Transports Petition.

The *Motor Convoy* case is no precedent upon which this Court, we respectfully submit, should now affirm a motion to dismiss. In fact, the results of that case emphasize the error of granting important rights without having a properly developed record upon which to base the decision.

It is clear from the decision and order in Appendix "A" that the District Court in issuing its decision in this case was strongly influenced by the *Motor Convoy* affirmation. In fact, at the oral argument, the Court

dwelled extensively upon the point that the decision was virtually binding upon it. Then, in the case of *United Transports, Inc. and Auto Convoy Co. v. The United States of America and the Interstate Commerce Commission* (United States District Court for the Western District of Oklahoma, No. 65-118, Civil, ... F. Supp. .....), the District Court on September 9, 1965, by a 2-to-1 vote sustained the Commission's grant of operating rights under the NATA policy. However, a strong dissent by Judge Luther Bohanon, District Judge, clearly denotes the need for review by this Court so that this matter may be finally determined. He found that a hearing was necessary under the involved statutes and the Fifth Amendment. Counsel for plaintiffs in the *United Transports* case has informed counsel for appellant that an appeal will be taken to the United States Supreme Court on substantially the same grounds as are here advanced.

Furthermore, by virtue of the success of the Commission in the *Motor Convoy* case other carriers are being encouraged to file similar petitions even though the purported diversion occurred some four or five years ago, and even though the remedy of NATA was prescribed by the Commission in 1962. So it appears that existing carriers such as appellant will be faced with an increasing number of new competitors who will be permitted to invade the areas of existing carriers' operations without any evidence of any need therefor whatsoever, all on an ex parte basis contrary to law. *(First National Bank of Smithfield v. First National Bank of ENC,* 232 F. Supp. 725 (1964).)

Thus, this Court should, we respectfully urge, in the interests of justice review the procedures adopted by the Commission contrary to those required by law and contrary to those observed by the Commission over the past fifty years. The orders issued by the Commission contain no opinion or explication of the bases upon which the orders are founded. There are no adequate findings and conclusions as required by the Administrative Procedure Act (5 U.S.C 1001, et seq.). If this were an isolated case, we could well understand the reluctance of the Court to grant full review, but it is not isolated. It is one of many, and there will be many more unless the Court aids justice by reviewing and determining the issues.

THE NATIONAL TRANSPORTATION POLICY IS THWARTED BY THE DECISION IN NATA AS IMPLEMENTED BY THE COMMISSION IN THE ORDERS COMPLAINED OF.

The basic policy in the disposition of cases such as this has been that by reason of the diversion to railroads the initial motor carriers should be permitted to "follow the traffic" to the railhead destination points for distribution from there by the motor carriers to surrounding areas.

The difficulty is that the Commission itself has emphatically rejected that theory in *Smith & Solomon Trucking Co., Extension,* 61 M. C. C. 748 (1953), where, upon a record made at a hearing, it pointed out the fallacy of the "follow the traffic" doctrine and said on pages 752-753:

". . . the grant of authority on a mere showing of loss of traffic without proof of lack of adequate existing service in the new location would be contrary to law and to sound reasoning."

". . . we are restricted by the Act to the issuance of authority only where the proposed service is required by the public convenience and necessity."

"There is one other aspect of this type of case which requires consideration. The declared transportation policy requires us to foster sound economic conditions in transportation. We are required, therefore, to consider among other things the effect of the injection of a new carrier, without proof of public need, on the existing competitive situation in the considered territory."

"If motor common carriers in a given area are affording satisfactory service for the public, they should not be made to suffer by the entry of a new carrier, which in the first instance, is seeking to follow a particular shipper."

The District Court for New Jersey in *Smith & Solomon Trucking Co. v. United States,* 120 F. Supp. 277 (1954), in sustaining the Commission said:

"The chief concern of the Commission, and rightly so, was to determine whether public convenience and necessity required the granting of this application. *Interstate Commerce Commission v. Parker,* 326 U.S. 60, 65, 65 S. Ct. 1490, 89 L. Ed. 2051; *United States v. Detroit Navigation Co.,* 326 U.S. 236, 241, 66 S. Ct. 75, 90 L. Ed. 38. This is the primary test under the statute and unless the application qualified under the test the Commission had no authority to allow it." (Page 279)

> Further: "The national transportation policy which the Commission had very much in mind and which is of vital importance in any decision on the instant type of transportation problem does make it mandatory on the Commission, as the latter states, 'to foster sound economic conditions in transportation.' By reason of that policy itself the Commission must carefully weigh the entire relevant situation." (Page 279)

There is even less reason to give credence to the "follow the traffic" theory in this case, and others like it, particularly where there is no hearing, because within the distribution area there are already motor carriers, such as Convoy, with complete facilities, including terminals on or adjacent to rail property, equipment, and personnel to effect distribution. These facilities have been acquired at tremendous expense, and appellant needs all of the traffic coming in by rail in order to effect efficient and economical distribution in full load lots, all as pointed out to the Commission in its protest and request for hearing and as developed by the exhibits offered to the District Court. Furthermore, the carriers with initial authority often interlined with appellant at a Montana point for delivery by appellant in Oregon, rather than incur the expense of transporting all the way through themselves. In any event, the adoption by the Commission of its rejected "follow the traffic" theory in these cases, without calling it that directly, is in violation of the national transportation policy, and should be reviewed by this Court. It is time, we urge, for this

Court to determine what weight, if any, the "follow the traffic" principle, as reborn in NATA, can be given under the national transportation policy and under Section 207 of the Interstate Commerce Act upon the determination of the issue of public convenience and necessity. The question is important not only to appellant, but to all of the many existing secondary motor carriers who are threatened with impairment under that principle by virtue of the NATA decision which in itself, as shown, is in limbo.

SUFFICIENCY OF THE COMMISSION'S ORDERS.

As noted, the Commission has not satisfied the minimum requirements of the Administrative Procedure Act, Section 8 (b), 5 U.S.C 1007 (b), which requires that decisions shall "include a statement of (1) findings and conclusions, as well as the reason or basis therefor on all the material issues of fact, law or discretion presented on the record; . . ." The Act, Section 1009, subsection 3 also gives the Court responsibility to determine all relevant questions of law and to set aside decisions which are unsupported by substantial evidence. The Act, including the review provisions, are applicable to the decisions of the Commission. *Riss & Co. v. United States,* 341 U.S. 907 (1951); *American Trucking Assns., Inc. v. United States* (supra), 364 U.S. 1 (1960); *Atlantic & St. Andrews Bay Railway Co. v. United States,* 104 F. Supp. 193 (1952); *Pacific Inland Tariff Bureau v.*

United States, 129 F. Supp. 472 (1955). The lack of findings apparent in this case fails to give the decision any validity under said Administrative Procedure Act. *Florida v. U. S.,* 282 U.S. 194 (1934), wherein the Court said:

> "The question is not merely one of the absence of elaboration or of a suitable complete statement of the grounds of the Commission's determination, to the importance of which this court has recently adverted (*Beaumont, S.L. & W.R. Co. v. United States,* decided November 24, 1930, 282 U.S. 74, 91 S. Ct. 1), but of the lack of the basic or essential findings required to support the Commission's order. In the absence of such findings, we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit. The Commission is the fact-finding body and the court examines the evidence not to make findings for the Commission but to ascertain whether its findings are properly supported."

A recent decision upholding these principles is *Northeast Airlines v. C.A.B.,* 331 F. 2d 579 (1964).

THIS APPEAL IS IMPORTANT.

As demonstrated herein, there are substantial legal questions raised on this appeal. The District Court did not come to grips with them, but in a cursory fashion dismissed the complaint because the Supreme Court had on motion affirmed the District Court in

the *Motor Convoy* case. The vital interest of numerous carriers in the principle here involved has now been revealed. The distinction between the *Motor Convoy* case and this case has been shown. The need for a determination by the Commission, pursuant to law, and on a case by case basis, has been established.

Unless the judgment of the Court below is reversed, appellant, Convoy Company, which has invested substantial sums and has been for years meeting the needs of the Chrysler Corporation in Oregon, will be threatened with the loss of needed traffic for which it holds the requisite authority and has the necessary facilities. That threat will be multiplied by successive ex parte grants by the Commission unless the Court calls a halt. Furthermore, many other carriers will be faced with similar impairment, all without any proof of need for new services. The indiscriminate handout by the Commission of certificates, without any evidence of the need therefor, will encourage a deluge of new petitions even though the NATA policy decision was issued in 1962. It must be evident that the carriers who felt they were warranted in applying for relief under the NATA policy would have promptly done so, yet petitions such as this one were filed long after that decision, and more will follow unless this Court makes a determination, as we respectfully submit it should, whether the Commission, contrary to its own well-established policies can short-circuit and circumvent the requirements of law by granting additional substantial rights of vital importance without any showing of public convenience and necessity

whatever, without hearing, and even without adopting modified procedure.

Wherefore, appellant prays that this Court note probable jurisdiction, hear this direct appeal on its merits, and reverse the judgment of the Court below.

Dated, November 1, 1965.

Respectfully submitted,

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Convoy Company.

(Appendices "A" and "B" Follow)

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Appendix "A"

In The United States District Court
For The District of Oregon

Civil No. 65-241

Convoy Company,
Plaintiff,
vs.
The United States of America and The Interstate Commerce Commission,
Defendants.

ORDER AND JUDGMENT

This Court has considered the evidence tendered by plaintiff, and, without determining its admissibility, finds that such evidence was not proffered to the Commission and is not germane to any issue in this case; and it appearing that the orders of the Commission dated December 17, 1964, and April 7, 1965, issued in its Docket No. MC-43038 (Sub-No. 415), *Commercial Carriers, Inc., Petition for Modification of Existing Certificate,* are supported by substantial evidence and are not arbitrary or capricious, and that the decision in *Motor Convoy, Inc. v. United States,* D.C. Ga. 1964, 235 F.Supp. 250, *aff'd per curiam,* 33 U.S.L. Week

3385 (U.S. June 1, 1965), ... U.S. ....., is persuasive.

Now, Therefore, the orders of the Commission are hereby affirmed and this action dismissed.

Dated this 20th day of July, 1965.

Ben C. Duniway
United States Circuit Judge

John C. Bowen
United States District Judge

Gus J. Solomon
United States District Judge

Appendix "B"

Service Date
December 23, 1964

ORDER

At a Session of the Interstate Commerce Commission, Division 1, held at its office in Washington, D. C., on the 17th day of December, A. D. 1964.

No. MC-43038 (Sub-No. 415)

Commercial Carriers, Inc.
(Romulus, Mich.)

It appearing, That Certificate No. MC-43038 (Sub-No. 415), dated December 15, 1959, was issued to petitioner authorizing operation as a common carrier by motor vehicle, in interstate or foreign commerce, as pertinent here, of new automobiles, in initial movements, in truckaway service, from Detroit, Mich., to points in Oregon;

It further appearing, That in its report and order in *National Auto Transporters Assn.—Declaratory Order, NATA,* 91 M.C.C. 395, (decided October 15, 1963), the Commission *inter alia,* (a) determined that motor carrier holders of "initial" and "secondary" authority to transport automobiles should be placed in a position to be able to continue to participate in the transportation of certain traffic they enjoyed prior to the advent of trailer-on-flatcar and multi-level rail car service, and (b) outlined a procedure for modifying the certificates and permits of such motor carriers;

Upon consideration of the record in the above-entitled proceeding, and of:

(1) Petition of Commercial Carriers, Inc., filed December 3, 1963, for modification of certificate;

(2) Petition of National Trucking Company, filed January 10, 1964, for stay of the proceeding, or, in the alternative, consolidation with Ex Parte No. 230 (Sub-No. 1), *Substituted Service—Charges and Practices of For-Hire Motor Carriers of Automobiles;*

(3) Reply of Commercial Carriers, Inc., petitioner in (1) above, filed January 27, 1964, to petition in (2) above;

(4) Reply by Convoy Company to petition in (1) above, filed January 27, 1964, embracing a request for oral hearing;

(5) Reply by Commercial Carriers, Inc., petitioner in (1) above, filed February 28, 1964, to request for oral hearing in (4) above;

and good cause appearing therefor:

We find, That the present and future public convenience and necessity require that Certificate No. MC-43038 (Sub-No. 415), dated August 1, 1958, be modified as set forth in the succeeding paragraph;

It is ordered, That upon full compliance by Commercial Carriers, Inc., with the requirements of sections 215, 217, and 221(c) of the Interstate Commerce Act and the rules and regulations of the Commission

thereunder, Certificate No. MC-43038 (Sub-No. 415), dated December 15, 1957, be modified by adding thereto the following:

> New automobiles, in secondary movements, in truckaway service from Portland, Oreg., to points in Oregon, restricted to automobiles manufactured or assembled at plants of the Chrysler Corporation at Detroit, Mich., and having an immediately prior movement by rail.

It is further ordered, That the requests for oral hearing in (2), (4), and (5) above be, and they are hereby, overruled, for the reason that disposition of the issues involved can be resolved on the basis of information of record and that no good cause appears at this time for assigning the matter for oral hearing;

It is further ordered, That, except to the extent modification is granted in the second preceding paragraph, the relief sought be, and it is hereby, denied;

And it is further ordered, That if applicant does not comply with the requirements set forth in the second ordering paragraph, within 60 days from the date of service of this order, or within such additional time as may be authorized by the Commission, the petition of applicant considered and disposed of by this order shall stand denied in its entirety, effective upon the expiration of the said compliance time.

By the Commission, Division 1.

(Seal) Harold D. McCoy,
Secretary.

Service Date
April 16, 1965.

ORDER

At a Session of the Interstate Commerce Commission Division 1, Acting as an Appellate Division, held at its office in Washington, D.C., on the 7th day of April, A.D. 1965.

No. MC-43038 (Sub-No. 415)
Commercial Carriers, Inc.
(Romulus, Mich.)

Upon consideration of the record in the above-entitled proceeding, and of:

(1) Petition of Convoy Company, protestant, filed January 21, 1965, for reconsideration of the order of December 17, 1964, modifying Certificate No. MC-43038 (Sub-No. 415), embracing a request for a stay of the proceeding pending determination of Ex Parte No. 230 (Sub-No. 1), *Substituted Service-Charges and Practices of For-Hire Motor Carriers of Automobiles;*

(2) Reply by Commercial Carriers, Inc., filed March 12, 1965;

and good cause appearing therefor:

It is ordered, That the motion be, and it is hereby, overruled for the reason that the order of the Commission, Commissioners Herring and Tucker, in Ex Parte No. 230 (Sub-No. 1), *Substituted Service-Charges and Practices of For-Hire Motor Carriers of Automobiles,* setting that proceeding for oral hearing

does not conflict with the modification of authority herein made pursuant to criteria set forth in *National Auto Transporters Assn.-Declaratory Order,* 91 M.C.C. 395;

It is further ordered, That the said petition be, and it is hereby, denied for the reasons (a) that the order of December 17, 1964, by Division 1, was entered in accordance with the law after it appeared applicant's certificate in No. MC-43038 (Sub-No. 415) should be modified and petitioner's petition for oral hearing denied, (b) that at the time applicant's petition for modification (which gave rise to this proceeding, filed December 3, 1963) was published in the Federal Register, ample opportunity was afforded interested persons to submit written statements and arguments, factual and legal, supporting their respective positions, (c) that statements and arguments were filed and considered in the disposition of the said petition of December 3, 1963, (d) that protestant has not shown what evidence, if any, will be offered if an oral hearing were held, (e) that the statements and arguments of position by protestants of record do not require or support a different conclusion than that reached in the said order of December 17, 1964, and (f) that no sufficient or proper cause appears for vacating or reconsidering the order of December 17, 1964. Compare *The Motor Convoy, Inc., et al. v. U.S.* 235 F. Supp. 250;

It is further ordered, That, unless compliance is made by applicant with the requirements of Sections 215, 217 and 221(c) of the Interstate Commerce Act,

within 90 days after the date of service of this order, or within such additional time as may be authorized by the Commission, the grant of authority made in the order entered herein on December 17, 1964, shall be considered as null and void, and the application shall stand denied in its entirety effective upon the expiration of the said compliance time.

By the Commission, Division 1, Acting as an Appellate Division.

(Seal)

Bertha F. Armes,
Acting Secretary.

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